

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of VASILIOS FOTINOS and DEPARTMENT OF STATE,  
Washington, DC

*Docket No. 99-2390; Oral Argument Held February 7, 2001;  
Issued March 8, 2001*

Appearances: *Vasilios Fotinos, pro se; Miriam D. Ozur, Esq.*, for the Director,  
Office of Workers' Compensation Programs.

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issues are: (1) whether an overpayment of \$9,691.08 occurred in appellant's case; and (2) whether the Office of Workers' Compensation Programs properly denied his request for waiver.

On April 19, 1988 appellant, then a 55-year-old motor vehicle operator, sustained an employment injury when he slipped and fell in a stairwell. The Office accepted his claim for a fractured right hand.<sup>1</sup>

Appellant was examined by Dr. Panagiotis A. Labropoulos to determine whether he had a permanent impairment as a result of the employment injury. He reported no loss of motion in the right wrist and a five percent permanent impairment of the right upper extremity due to weakness, atrophy or pain. Based on this evaluation, the Office issued a schedule award on June 1, 1989 for a five percent permanent impairment of the right arm.<sup>2</sup>

On February 28, 1990 appellant was reevaluated by Dr. William A. McNamara. He reported a five percent impairment of the right upper extremity due to loss of motion. His overall rating of 10 percent indicated that appellant had the same 5 percent impairment due to weakness, atrophy or pain that Dr. Labropoulos reported. Based on this new medical evidence,

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<sup>1</sup> Appellant was diagnosed with a right distal radius fracture.

<sup>2</sup> The record contains computer printouts showing check dates and amounts paid, confirming that the Office paid the award. The record also contains a report of telephone contact dated August 31, 1989 showing that the Office and appellant went over the schedule award and the dates of the checks to satisfy appellant's curiosity and to establish that all checks had been received.

the Office issued a schedule award on April 19, 1990 for an additional five percent permanent impairment.<sup>3</sup>

On December 27, 1993 appellant sustained another employment injury when he turned his steering wheel sharply to avoid a collision. The Office accepted his claim for aggravation of right wrist fracture, aggravation of right wrist osteoarthritis and excision of right distal ulna.

On February 7, 1995 appellant was reevaluated by Dr. Mark M. Theiss. He reported the same five percent impairment of the right upper extremity due to weakness, atrophy or pain that both Dr. Labropoulos and Dr. McNamara had reported. Dr. Theiss also reported a nine percent impairment as a result of the nonunion of the ulnar styloid. He concluded that appellant's right upper extremity had a total impairment of 14 percent. Based on this information, the Office issued a schedule award on March 21, 1995 for a 14 percent permanent impairment of the right upper extremity.<sup>4</sup>

On May 15, 1996 the Office issued a preliminary determination that an overpayment of \$9,691.08 had occurred in appellant's case because the Office paid a schedule award for 14 percent when appellant was due only an additional award of 4 percent. The Office determined that it had erroneously paid appellant again for the first 10 percent of impairment and calculated the overpayment as equal to the amount of appellant's first two schedule awards. The Office found that appellant was without fault in the matter and requested that he complete an attached overpayment recovery questionnaire and attach any supporting documents in his possession, such as income tax returns, bank account statements, bills, cancelled checks reflecting payment, pay slips and other records to support the income and expenses listed on the questionnaire. The Office advised appellant as follows:

"This information is necessary to assist the Office in deciding whether or not to waive the overpayment. In the event that waiver is not granted, this information will be used to decide how to recover the overpayment. No collection action shall be taken until a final decision on your request for waiver has been reached.

"It should be noted that under the provisions of section 10.324 of Title 20 of the Code of Federal Regulations, the failure to furnish the financial information requested on the enclosed questionnaire (or other information required by this Office in connection with a request for waiver) within 30 days will result in a denial of waiver of the overpayment and no further request for waiver will be considered until the requested information is furnished."

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<sup>3</sup> The record again contains a computer printout showing the check date and amount paid, confirming that the Office paid the award. It is important to understand, because the issue will arise again in this case, that the second schedule award was for additional impairment only. The first schedule award was for 5 percent, but when Dr. McNamara's evaluation showed a 10 percent impairment, the Office issued a second or additional schedule award for 5 percent to bring appellant's total award (5 percent plus 5 percent) in line with the current rating. Had the Office paid 10 percent with the second schedule award, appellant would have effectively received the first 5 percent twice (5 percent plus 10 percent), giving him 5 percent more than the impairment Dr. McNamara reported.

<sup>4</sup> The record again contains computer printouts showing check dates and amounts paid, confirming that the Office paid the award.

On June 3, 1996 appellant requested waiver and submitted a number of financial documents. He advised that his wife was only 44 years old and was not involved in any dispute with the Office about overpayments for which he was not at fault. Appellant advised that his wife did not authorize him to release any information about her finances.

The Office took no action on the overpayment or appellant's request for waiver until May 28, 1998, when a conference call was held to obtain current financial information. Appellant submitted additional financial documentation to support his request for waiver. Although, he indicated that he currently lived with his wife, who was retired, he did not provide her financial information. Appellant did submit a May 28, 1999 letter from his wife, who advised as follows:

"My name is Leonora Fotinos. I am 47 years old and retired due to osteoarthritis. For fourteen years, I ran a day care center out of my home. I had to close my business due to illness.

"My husband is 67 years old and disabled. His total income is \$903.00 a month. Since 1995, I have supported my husband.

"For this reason I do not wish to be involved with my husband's financial difficulties with the Department of Labor. The difficulties are for the past overpayments which were not his fault. Also, I do not permit my husband to disclose my financial statements to anyone."

In a decision dated June 25, 1999, the Office finalized its preliminary determination that an overpayment of \$9,691.08 occurred in appellant's case. The Office decided not to waive the overpayment because the refusal of appellant's wife to disclose her financial information made it impossible to determine whether recovery of the overpayment would cause a financial hardship.

Appellant filed his appeal with this Board on July 8, 1999. An oral argument before the Board was held on February 7, 2001, at which appellant appeared to present his case. The Board has carefully studied the record in this case and considered appellant's arguments on appeal.

The Board finds that an overpayment of \$9,691.08 occurred in appellant's case after the Office issued a schedule award on March 21, 1995 for a 14 percent permanent impairment of the right upper extremity.

Appellant initially received a schedule award for a 5 percent permanent impairment of the right upper extremity. When later medical evidence showed that he had a 10 percent impairment, the Office correctly issued a second schedule award only for an additional 5 percent, bringing the total percentage paid (5 percent plus 5 percent) in line with the current rating (10 percent). When still later medical evidence showed that appellant had a 14 percent impairment of the right upper extremity, the Office made a mistake. Rather than issue a schedule award only for an additional 4 percent to bring the total percentage paid (5 percent plus 5 percent plus 4 percent) in line with the current rating (14 percent), the Office paid for a full 14 percent impairment. As a result appellant received compensation for a 24 percent impairment (5 percent plus 5 percent plus 14 percent) when the medical evidence showed that the total impairment to his right upper extremity was 14 percent. The third schedule award thus created an overpayment

of 10 percent and effectively repaid appellant for the first two schedule awards he had already received. The Board finds that appellant was entitled to only an additional 4 percent and not the full 14 percent paid.

The fact that the third schedule award was based on a separate injury is of no consequence; otherwise, serial injuries to the same extremity could theoretically compensate appellant for an impairment exceeding 100 percent, or more than he would receive had he lost his arm completely. The Federal Employees' Compensation Act does not contemplate such an absurd result.

Section 8108 of the Act<sup>5</sup> provides for the reduction of compensation for subsequent injury to the same member:

“The period of compensation payable under the schedule in section 8107(c) of this title is reduced by the period of compensation paid or payable under the schedule for an earlier injury if --

(1) compensation in both cases is for disability of the same member or function or different parts of the same member or function or for disfigurement; and

(2) the Secretary of Labor finds that compensation payable for the later disability in whole or in part would duplicate the compensation payable for the preexisting disability.”

Compensation for both appellant's employment injuries was for disability of or impairment to the right upper extremity. Further, the Office found that compensation payable for the later disability or impairment would duplicate the compensation paid for the preexisting disability or impairment. The Office, therefore, properly determined that appellant was entitled to a schedule award for only an additional four percent as a result of the second employment injury.

The Board also finds that the Office properly denied appellant's request for waiver.

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>6</sup> If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless

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<sup>5</sup> 5 U.S.C. § 8108.

<sup>6</sup> 20 C.F.R. § 10.433(a).

(1) adjustment or recovery of the overpayment would defeat the purpose of Act or (2) adjustment or recovery of the overpayment would be against equity and good conscience.<sup>7</sup>

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.<sup>8</sup>

Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.<sup>9</sup>

Although appellant is without fault in the matter of the overpayment, he nonetheless bears responsibility for providing the financial information necessary to support his request for waiver of the overpayment. Appellant submitted documentation to support his request, but his wife refused to disclose her financial information.<sup>10</sup> She advised that she did not wish to be involved with her husband's financial difficulties with the Office. Because appellant's did not disclose this information, or permit appellant to disclose this information, the Office cannot determine whether or not recovery of the overpayment would defeat the purpose of the Act or be

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<sup>7</sup> *Id.* § 10.434. Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents. *Id.* at § 10.436. Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt. *Id.* at § 10.437(a). Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. *Id.* at § 10.437(b).

<sup>8</sup> *Id.* at § 10.438(a).

<sup>9</sup> *Id.* at § 10.438(b).

<sup>10</sup> The individual's total income includes any funds that may reasonably be considered available for his or her use, regardless of the source. Income to a spouse will not be considered available to the individual unless the spouse was living in the household both at the time the overpayment was incurred and at the time waiver is considered. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6.a(2) (September 1994).

against equity and good conscience.<sup>11</sup> Appellant's failure to submit the information requested gave the Office no choice but to deny his request for waiver.<sup>12</sup>

The June 25, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
March 8, 2001

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>11</sup> Under Office procedures, an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. If this condition is met and the individual's nonexempt assets do not exceed \$5,000.00 (the asset limit for an individual with a spouse), recovery of an overpayment will defeat the purpose of the Act and warrant waiver. Waiver requires that both conditions be met. *Id.* at Chapter 6.0200.6.a(1), 6(a)(4) (September 1994). In this case, appellant disclosed approximately \$41,000.00 in assets. Further, although his financial documentation shows that he paid for his daughter's college expenses, appellant made no showing to the Office that he would not otherwise have incurred this financial obligation but for the receipt of overpaid compensation. *Id.* at Chapter 6.0200.6.b(3) example 3.

<sup>12</sup> See *supra* note 8.